

Flathead Joint Board of Control of the Mission, Jocko and Flathead Irrigation Districts
Special Meeting
November 2, 2015

All present

Executive Session was held from 4:00 PM to 5:10 PM

Call to order: 5:18 PM

Agenda item #1 – Report on FERC Settlement Conference.

Chairman Boone Cole introduced Washington DC Attorney Kathleen Mazure, who was appearing by telephonic conference call. K. Mazure reported that no FERC negotiations took place at this particular meeting, only an exchange of documentation. She stated that all parties presented negotiating positions and that her major concern was if the FJBC would receive anything. Her firm is working diligently to acquire pertinent documentation defending the FJBC's position. FERC is now requiring all parties to submit a substantive brief describing legal positions in greater detail. A paper is being drafted for presentment explaining why the FJBC is allocated the low block cost of power as per the judge's order and will be submitted to the FJBC for approval. An additional settlement conference has been scheduled for January 2016 and the exchange of the requested position statements is expected to take place on Friday, November 13, 2013.

Agenda item #2 – Attorney L. Kogan Motion to Intervene in FERC and withdrawal stipulations.

K. Mazure provided an update on a recent claim/Intervention documents filed by New York based Attorney L. Kogan on behalf of his individual clients, claiming a direct interest in the ongoing FERC proceedings and that the board in his client's opinion, did not/does not represent their specific individual interests. She went on to state that if L. Kogan should be granted the late Intervention as requested, he would be allowed to participate in upcoming negotiations. It is the position of L. Kogan and plaintiffs that the Irrigation Districts/FJBC did not sufficiently include them in preparation for low block cost of power (LBC) negotiations and that this current board and districts are taking the wrong course of action by limiting their negotiations.

Correspondence dated November 2, 2015 detailed specific stipulations to L. Kogan on behalf of his clients (withdrawing the filed FERC Intervention) to include the FJBC not proceeding legally or otherwise at the state, federal or local levels against a minority of individual board members now listed as plaintiffs. Secondly, to include for mentioned board members in all meetings both open and executive without exception. Concern was also stated regarding ensuring that the informational flow be uninterrupted due to what the majority FJBC may feel to be a conflict of interest on his client's part. L. Kogan additionally requested that his firm be admitted as an observer/representative-at-large on behalf of the FJBC allowing him admittance to all confidential FERC proceedings. A number of additional terms were included but not admitted to public record due to the confidentiality clause.

K. Mazure provided the board with response options to L. Kogan's demand letter dated November 2, 2015 to include:

A. No board response.

B. Respond but do not oppose.

C. Correct the misstatements/allegations and oppose the Intervention.

- **Commissioner Jerry Laskody motioned for the board to choose option C, Correct the misstatements/allegations and oppose the intervention and was seconded by Commissioner Tim Orr.**

Public Comment:

Commissioner Jerry Laskody stated his belief that the statements/allegations made by L. Kogan in the FERC intervention are false and by the board taking this appropriate action, it will protect the current position of the FJBC. Commissioner Dean Brockway responded that he would vote against this motion, due to the advice received by the various attorneys and what he perceives to be misrepresentation. Commissioner Shane Orien informed those in attendance that L. Kogan's intervention has added an additional \$10,000 to the 2015 FJBC fiscal expenditures, with no ceiling at this time to continue to argue an invalid claim. Commissioner Tim Orr commented that in recent trips to Washington DC, Chairman Boone Cole spent precious time fighting this Intervention instead of working with attorneys to strengthen this board's case on the low block cost of power issue.

Gene Erb commented on a Northwestern Energy filing dated April 3, 1920. It is his opinion that the tribe was sold the dam with a junior water right in that they are currently claiming all reservoirs. He recommended that the board continue to look into water issues. Chairman Boone Cole requested that K. Mazure respond to Gene Erb's concerns. K. Mazure stated that FERC does not adjudicate water rights, they take direction from Congress and it is her opinion that the issues stated are within the state court's jurisdiction. She believes that to entertain such issues, would undermine the low block cost of power. Chairman Boone Cole reminded the public that the 1985 agreement is available for viewing upon request and that the FERC hearing is limited in subject matter, this board is bound by the agreement previously entered into in 1985 by the previous FJBC board members.

Commissioner Tim Orr commented that the previous board received an increase from 8.4 MW 212.2 MW within their negotiations and that in his opinion such efforts should not be forgotten. He believes the real negotiating power is within the irrigation districts and that in 2005, the previous board had an opportunity to request more, but unfortunately did not respond. He stressed that this board will not miss deadlines or dates in regards to the low block cost of power. Elaine Willman commented that on August 14, 2015 L. Kogan contacted the FJBC with a request to be placed upon a meeting agenda. She stated that his communications could only be addressed under public comment and upon late notice, the public meeting was canceled in which L. Kogan had planned on attending. She went on to state that an additional meeting on August 12, 2015 with the Attorneys of Record Kristin Omvig and Bruce Fredrickson, was not beneficial and it is her opinion that these events contributed to the current misunderstandings.

Attorney B. Fredrickson responded that his firm had agreed to meet with Attorney L. Kogan prior to his recent filings, to discuss specific issues with the Kerr Dam purchase by the CSKT tribe. L. Kogan communicated his desire that the FJBC become involved in that subject matter. It is Fredrickson's opinion that L. Kogan provided nothing but hypothetical allegations and when questioned regarding supporting documentation, Kogan did not possess any at that time. Fredrickson went on to state that his firm asked to be included in communications and to have any and all documentation provided when it became available. During the meetings in question, Kogan was unable to cite case law supporting his legal position and for these reasons legal counsel and the FJBC could not become associated with these individual groups efforts. Fredrickson stated that shortly after this meeting, L. Kogan filed a motion in an attempt to cease the CSKT purchase of Kerr Dam (i.e. security issues) and lost his argument due to lack of evidence or case law. Both members of legal counsel believed the meeting with L. Kogan to be civil in nature and have continued to provide multiple opportunities to L. Kogan to provide information as he saw fit.

Chairman Boone Cole stressed that review of this issue should not be perceived as an attack on L. Kogan personally and that this board is willing to work with anyone who is willing to work forward on the issues at hand. He went on to state that countless hours have been spent protecting the rights of the irrigators but adding that this board refuses to work with anyone who undermines such efforts or the character of its members. Chairman Cole reminded the public of this board's commitment to fighting what it perceives to be owed to not only this board but the irrigators. David P. questioned a rumor circulating that the District Court had provided an option for a jury hearing and that the FJBC had declined, opting for the judge to make final ruling on the legality of the CSKT Compact. He also questioned whether the items of disputes in L. Kogan's intervention could be made public. Chairman Boone Cole responded that FERC requires all documentation to be held strictly confidential until the completion of initial negotiations and therefore those items discussed in executive session could only be addressed in generality within the public meeting. Bruce Fredrickson responded to the question as it related the filing within Manley's court, stating that this type of filing did not provide an option for a jury trial so therefore it is incorrect to assume that any decisions were made outside of public knowledge.

K. Mazure responded that only cross examination can be released for public review and that settlement negotiations are strictly privileged as well as preparation for negotiations. She admitted that such requirements are a severe disadvantage but compared it to a poker hand, stating an individual does not show their hand to someone else. L. Kogan cited confidential board information within his filings, therefore showing the FJBC's hand to the tribes. Mazure again stressed the requirement of confidentiality and communicated that if such requirements were violated/breached a sanction would apply or worst case scenario, FERC could dismiss the (LBC) case in its entirety for violation. Mazure believes that her firm had successfully stressed over the previous months with all board commissioners prior to negotiations and that settlement and litigation strategy could be used against this board and a hearing.

Attorney Bruce Fredrickson commented that settlement negotiations are not available in a trial setting and that if parties participating in this negotiation were to come to a term of agreement, such agreement would be presented to a full board, allowing such information to become public. Fredrickson stated his agreement with the unsubstantiated claims within L. Kogan's Intervention and related filings.

Attorneys Fredrickson and Mazure reiterated the point that FERC does not and will not adjudicate water rights in any fashion and that the 2015 CSKT Compact in no way binds the current FERC proceedings. David P. questioned whether the additional Interventions filed were dismissed due to lack of standing and if the discussion of the current issue with L. Kogan related to some board members being listed as plaintiffs. K. Mazure responded that the FJBC had a valid claim/argument within their Intervention and that for a filer to come in late, they would have to have separate interests than that of this board. Chairman Boone Cole stated that this board has remained dedicated to the irrigators and has diligently worked to fulfill any and all promises made to the public. He reminded the public that this board was working under strict FERC regulations and that no decisions would be made on their behalf without bringing it back to this board and allowing public comment at that time. Chairman Cole requested that the public trust in their efforts, knowing that they have worked hard to get to this point and have no intention of giving up anything without getting something beneficial in return.

Commissioner Tim Orr responded that this is solely about low block cost of power (LBC) and reminded that this project is owned by the United States of America. Orr went on to state that the USA reserved the water for the Flathead Irrigation Project to distribute to irrigators throughout the entire valley and in doing so, receives a break on power because of the irrigation. Commissioner Orr 's belief that the government has granted the "USE" and are not giving a specific right to anyone. Commissioner Orr questioned, if our intervention is dismissed due to the recent activities of L. Kogan, where is our next avenue? Orr believes that this board has attempted to provide as much information as allowed and that because of the strong work of all board attorneys, this board is in a better position than it has been in over 35 years. Commissioner Orr again requested that the public continue to trust in the efforts and abilities of the FJBC.

Chairman Boone Cole called for a vote on the motion for consideration.

- **Commissioner Jerry Laskody motioned for the board to choose option C, Correct the misstatements/allegations and oppose the intervention and was seconded by Commissioner Tim Orr.**
- **Motion carried – Commissioner Dean Brockway against; Member at Large Ted Hein abstained.**

Agenda item #3 – Irrigator claim of damages within the Flathead Irrigation Project.

Commissioner Shane Orien provided a brief description of a Mission fee-land irrigator whose residence was flooded on May 29, 2015. Such irrigator has exhausted all measures to have such damage reimbursed. Commissioner Orien requested that this board look into its options to offer assistance. (A list of damages and efforts were read for board consideration) Commissioner Gene Posivio questioned the total financial reporting for damages. Bill Slack recommended a tort system as an additional remedy.

- **Commissioner Wayne Blevins motioned to postpone this issue until further information could be acquired and was seconded by Commissioner Bruce White.**
- **Motion carried – unanimous**

Meeting was adjourned at 6:45 PM